NOT YET SCHEDULED FOR ORAL ARGUMENT
No. 18-1125, consolidated with No. 18-1143

United States Court of Appeals for the District of Columbia Circuit

LONG BEACH MEMORIAL MEDICAL CENTER D/B/A MEMORIALCARE LONG BEACH MEDICAL CENTER & MEMORIALCARE MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

and,

CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES UNITED,
Intervenor for Respondent.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

PETITIONER'S/CROSS-RESPONDENT'S OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Petitioner/Cross-Respondent Long Beach Memorial Medical Center makes the following certification:

(A) Parties and Amici. The parties in the matter under review before this Court are (1) the Petitioner/Cross-Respondent—Long Beach Memorial Medical Center d/b/a MemorialCare Long Beach Medical Center & MemorialCare Miller Children's and Women's Hospital Long Beach ("Long Beach" or "Hospital") and (2) the Respondent/Cross-Petitioner—the National Labor Relations Board ("Board" or "NLRB"). The California Nurses Association/National Nurses United ("Union") was the charging party before the Board, and entered an appearance as an Intervenor, here. No *amici* have been before the Board, or are now before this Court.

(B) Rulings Under Review. The ruling under review in this matter is a Decision and Order of a three Member Panel of the Board (Members Pearce, McFerran and Emanuel) in NLRB Case No. 21-CA-157007, reported at *Long Beach Memorial Medical Center Inc.,* 366 NLRB No. 66 (April 20, 2018), and which was "corrected" on June 20, 2018, with the same reporting citation. JA 768-782.

(C) Related Cases. This case has not previously been before this, or any other, court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, Petitioner/Cross-Respondent Long Beach hereby discloses the name of its parent corporation is Memorial Health Services, it is a not-for-profit corporation engaged in providing health care services, and it does not have any publicly traded stock.

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GLOSSARY OF ABBREVIATIONS

Act or NLRA	National Labor Relations Act, as amended
ALJ	Administrative Law Judge
Board or NLRB	National Labor Relations Board
CNA or Union	California Nurses Association/National Nurses United
Ex.	Exhibit
General Counsel	National Labor Relations Board General Counsel or Counsel for the General Counsel
Hospital or Long Beach	Long Beach Memorial Medical Center
JA	Joint Appendix
RN(s)	Registered Nurse(s)

INTRODUCTION

The Board decision on review is so riddled with confusion and errors that the issues and facts are almost unrecognizable from the record evidence. The Board also conveniently ignored and failed to apply the controlling legal precedent case, and opting to misapply irrelevant case law instead.

The Board's decision is almost devoid of any facts in the record because it did not rely upon any contextual facts in making its decision. Rather, it relied entirely on its own strained reading of the policy language itself, a reading it did in a vacuum without regard to facts, context, reasonableness or controlling law. The Board's decision ignores the voluminous contextual factual evidence—the very evidence the controlling authority explicitly directs be considered.

In this case, the Board erred in finding that Long Beach[1] violated the Act by maintaining two "overly broad" rules: one single sentence it its "Dress Code and Grooming Standards-Policy #318" ("I.D. Rule") and another single sentence in its "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers Policy PC-261.02" ("Memorial-reel Rule").

[1] The Hospital is a non-profit subsidiary of its parent corporation, Memorial Health Services ("MHS"), which does business as "MemorialCare." In terms of its *logo* and *branding*, the Hospital uses the *MemorialCare logo*. "MemorialCare" and "Memorial" are used interchangeably throughout.

Instead, in its wholly unsupported and errant decision, a three Member Panel of the Board (Members Pearce, McFerran and Emanuel) entirely "passed" on deciding the facts and issue relating to the I.D. Rule, and a two-Member Majority (Pearce and McFerran) applied the wrong law and ignored the facts with respect to the Memorial-reel Rule. In 2016, throughout the ALJ Hearing and in their appeal to the Board, the General Counsel and the Union based their cases on the "reasonably construe" analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)("*Lutheran Heritage*"), which was the controlling case for analyzing workplace rules at the time. The parties extensively briefed their positions under *Lutheran Heritage*, thus the briefs filed by the parties must be considered part of the record on appeal from the ALJ's decision.

On December 14, 2017, the Board expressly overruled the *Lutheran Heritage* "reasonably construe" test and announced a new test for analyzing the lawfulness of workplace rules in *The Boeing Company*, 365 NLRB No. 154, at 3 ("*Boeing*"). In *Boeing*, the Board explicitly stated the new standard applied retroactively to all pending cases. *Id*. at 14-17. This case was pending at that time.

On April 20, 2018, four months after *Boeing* was decided, the Board issued the decision in this case. Yet the decision fails to apply or even mention *Boeing*, even though it is controlling and its holding is binding on the Board. The Board should have applied *Boeing* to the facts of this case, but it did not. There is no

excuse, much less any explanation, for this. The Board's decision should be set aside. The substantial evidence in the record must be viewed and analyzed under the new standard set forth in *Boeing*, and such analysis makes clear that the Hospital's attire rules are lawful.

STATEMENT OF JURISDICTION

On April 20, 2018, the Board issued its decision and order, which it then "corrected" on June 20, 2018. On May 9, 2018, Long Beach filed a Petition for Review, and a supplement on June 28, 2018 to encompass the "correction" ("Petition"). On May 18, 2018, the Board filed a Cross-Application for Enforcement, which was consolidated with the Petition and treated as a cross-appeal. The jurisdiction of the Court rests on 29 U.S.C. §§160(e)-(f).

STATEMENT OF THE ISSUES

1. Whether the Board erred in ignoring and failing to apply controlling precedents, including *Boeing*, without providing any reason or explanation for doing so—especially when the Board's rulings, findings and conclusions are inconsistent with such precedents.

2. Whether the Board erred in its rulings, findings and conclusions that Long Beach violated the Act by maintaining two narrowly-tailored attire rule requirements when the substantial evidence on the record shows that it is

undisputed that Long Beach's policies are based on legitimate justifications and special circumstances.

3. Whether the Board erred by failing to explain why it ignored and/or rejected factual record evidence and controlling legal authority that was in conflict with, and contrary to, the Board's rulings, findings and conclusions without providing any rational explanation or reasonable basis for doing so.

4. Whether the Board abused its discretion, exceeded its authority or acted in an inexcusable, irrational, arbitrary and/or capricious manner by finding the Hospital's attire rules unlawful, particularly as the Board misapplied, misstated and/or ignored fundamental facts, issues and controlling law.

STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are set forth in an addendum to this brief.

STATEMENT OF THE CASE

I. Factual Background.

A. The History of the Parties, the Hospital and I.D. Badge Requirements.

The Hospital employs about 6,000 employees,[2] half of which are unionized, including 2,100 RNs represented by the Union for over 15 years. JA 131-133; 211,

[2] All references to the number of employees are based the record at the time of the Hearing. Current numbers may have fluctuated and changed.

233-234. Approximately 3,800 of the Hospital's employees are direct patient care providers. JA 210-211, 233-234. Located in an urban area of Long Beach, California, taking up approximately 10 city blocks, the Hospital is enormous; it is the second largest hospital campus west of the Mississippi River. JA 210-230, 497-552. For various reasons, such as the Hospital's location and the necessity of heightened security that comes with having a children's and women's hospital, the Hospital has invested enormous financial and other resources toward extensively enhancing its security protocols over the years. *Id*. The Hospital employs its own 24/7 security force consisting of about 70 dedicated security personnel and three K-9 units. *Id*. The Hospital is responsible for maintaining order and ensuring the safety of thousands of people each day. *Id*.

There are security desks at every public entrance, and everyone who enters the Hospital is required to wear some type of Hospital-issued identification badge, including children. JA 217-230. The Hospital has implemented an electronic visitor management system that requires all visitors to have their drivers' license electronically swiped to ensure they are not known sex offenders, domestic violence offenders, violent crime offenders, etc. *Id*., JA 497-524.

The two challenged policies were not implemented or promulgated in response to union organizing or activities, nor are they related, and they were implemented several years apart. JA 6-16, 90-92, 151-152, 226-227, 553-557, 567.

B. The Phrase "Pins, Badges and Professional Certifications" Only Applies to What May Be Displayed on Employee I.D. Badges.

The challenged I.D. Rule constitutes a single sentence in Policy #318 and states "Only MHS approved pins, badges, and professional certifications may be worn." JA 470-472. The evidence presented demonstrated that this rule *only* relates to what employees can wear on their I.D. badges. JA 90-91, 151-152, 235, 340, 480, 485, 487, 496. The Hearing evidence made clear that employees understand the rule only relates to Hospital-related identification pins worn on I.D. badges. *Id*. The evidence proved the Hospital has legitimate business reasons for restricting information displayed on employee I.D. badges. JA 210-230, 497-552.

The Hospital has eight policies of varying types that together set forth the rules and requirements relating to Hospital I.D. badges. JA 470-472, 477-479, 497-524, 527-532. Employee I.D. badges are addressed in four Hospital security policies, two Hospital Influenza vaccination policies and two Hospital dress/appearance policies. *Id*. All eight policies, including the two challenged policies at issue, use the words "identification badge," "I.D. badge," "name badge" and/or "badge" interchangeably to refer to employee I.D. badges. *Id*.

All eight policies, particularly when viewed in the context of the Hospital's extensive security system and the reasons for them, make it clear that the Hospital takes employee I.D. badges very seriously. *Id*. Accordingly, these policies reserve and reference the Hospital's right to approve, authenticate, authorize, verify, and

inspect the varying aspects of employee I.D. badges. *Id*. One such policy states: "The Security Department is responsible for producing and issuing all identification badges with the picture, person's name, title and personnel information, and department on the badge. All badges are the property of the hospital." JA 522-524. The policy provides clear instruction that "Possession or use of another employee's *I.D. badge* is prohibited." *Id*. (emphasis added). Further, the Hospital requires that all employees annually receive an Influenza vaccination. JA 527-532. Hospital policies states that vaccinated employees "will receive a new colored special 'dot' for their name badge," and "Please be sure to display your sticker while in the workplace." *Id*.

The hard I.D. badge itself is electronically coded, providing individualized authorized access only to vital areas, such as the children's units, and to sensitive materials, such as medications, within the Hospital. JA 134, 225-226. A retired RN and Union steward explained the I.D. badge, as follows:

> The identification badge allows you to clock in so you can get paid; it allows you to park your vehicle on campus because you can't get the gate to come up without your badge; it allows you to go down corridors, open doors; you can't get into certain areas such as the pharmacy without your badge. *Your badge is a security device, it is a picture ID, and it allows the patient to see that indeed you are who you say you are*.

JA 134 (emphasis added).

Another Union steward testified that she understood the purpose of the I.D. badge, specifically that it "identifies who we are and what position we hold" and "allows us to get in and out of the department by swiping our badge to get out of doors that are controlled." JA 75-76. Hospital employees use their I.D. badge multiple times on any given workday to swipe it against a coded, electronic plate located outside access-limited doors to gain entry, as authorized. JA 76, 134-135.

The Hospital provides all employees with an I.D. badge inside a plastic cover with two holes at the top, to which employees affix Hospital-related pins. JA 89-90, 480. Employees attach small Hospital-related identification pins to the top of the plastic cover of the I.D. badge. JA 63, 90-92, 152-156, 235-237, 291-292, 467-469, 567. These pins include "professional certification" pins indicating that a health care professional has been certified in a particular specialty area, years of service pins and "I-Give" pins.[3] *Id*. These Hospital-related pins serve important business objectives by helping patients and others quickly identify that employees are qualified (professional certification pins), experienced (service pins) and/or invested in their care (I-Give pins). JA 232-238, 497-532. Except for these legitimate business I.D. enhancers, the I.D. badge is to be free from obstructions or distractions, thus the I.D. Rule. *Id*.

[3] I-Give is a Hospital program that promotes service, commitment and ownership by enabling employees to donate to the various Hospital health centers.

The overwhelming evidence presented reflects the longstanding policy of employees wearing Hospital-related pins on their I.D. badges, and employees understand the challenged rule applies only to their I.D. badges, which should be unadulterated except for the Hospital-related pins and annual Flu shot sticker. JA 90-91, 151-152, 235, 470-472, 487, 493, 494.[4] Contrary to the Board's suggestion otherwise, the rule regarding pins worn on I.D. badges has remained unchanged for *many years*. JA 90-92, 97, 480, 494, 567.

One employee testified that she received her "15 years with Memorial" service pin at an award luncheon, then stated "So it's on my badge." JA 90-91. A retired RN and former Union steward testified how she took a photo of the pins she had collected over the years, stating: "These are pins that have either been issued through Long Beach Memorial or through a certification body for the purpose of wearing on your badge." JA 152-155, 494. The General Counsel introduced multiple exhibits that included images of various different Hospital-related pins, including professional certification pins. JA 480, 485, 487, 493-494, 496. Some of the exhibits show the pins actually affixed to employee I.D. badges. JA 480, 485, 496. Importantly, all the testimony at the Hearing made clear that employees

[4] Employees also understand that the important identifying information displayed on their I.D. badges should otherwise remain visible and unadulterated JA 90-92, 97, 480, 494.

equated the word "pins" solely with the pins they wear on their I.D. badge, and there was no evidence introduced of employees wearing pins anywhere *but* on their employee I.D. badge. JA 90-91, 151-152, 235, 480, 485, 487, 493-494. Moreover, Policy #318 does not reference or limit the wearing of any insignia, much less union insignia. JA 470-472. In fact, credible evidence made clear that employees were free to wear, and in fact did wear, union insignia—just not on their I.D. badge. JA 119-120, 164, 199, 238-239, 277-278, 283-289, 349, 470-479.

C. In 2014, the Hospital Commissioned the Design of a Specific, Standardized Uniform for Its Direct Patient Care Providers.

The Memorial-reel Rule is not overbroad, nor is it be open to any "interpretation." The Memorial-reel is an integral part of the direct patient care provider uniform itself, and *only* the Memorial-reel can be worn as part of the uniform. It does not matter that the language in Policy 261.02 states that the badge reel must be branded with "MemorialCare *approved* logo or text." GC. Ex. 6. The overwhelming testimony at the Hearing demonstrated that there is no choice, and there is no approval needed. There is unambiguously only one type of badge reel that is considered part of the uniform: the Memorial-reel.

In early 2014, the Hospital decided it was going to transition its 3,800 direct patient care providers to a standardized, branded uniform. JA 77, 136, 138. Prior to the Hospital's moving to a standardized uniform, the Hospital allowed care providers to wear scrubs of varying colors and patterns and bearing varying images

and insignia. JA 77, 136, 138, 316, 323-325. The Hospital had legitimate, uncontested, business justifications for its standardized uniform.[5] JA 209-210, 217, 232-233, 260. The Hospital provided evidence that standardized uniforms in a Hospital setting promoted a feeling of security for patients, "very similar to how a police officer's uniform creates safety and security." JA 246.

Concurrently, the Hospital also decided to adopt a "Bare Below the Elbows" approach for all its direct patient care providers to prevent Hospital-acquired infections due to items that are prone to touching patients, such as watches, lanyards, sleeves, bracelets, etc. JA 135, 138, 473-479. Prior to this change, which rolled-out starting on December 1, 2014,[6] direct patient care providers were allowed to wear lanyards and badge reels of any type or color of their choosing. JA 161-162. However under the new uniform policy, the Hospital streamlined and standardized the uniforms requiring all patient care providers who are working in patient care roles in patient care areas to only wear the Memorial-reel, and no lanyards. A Union steward explained the reasoning for this, stating "a badge [on a

[5] There can be no question that the Hospital has the right to create a standardized uniform for patient-care purposes. The Union and the General Counsel objected on the basis of *relevance* to any testimony or evidence regarding business justifications, including the Hospital's Exhibit 9, which was "about attire" as well as infection control. JA 251-258, 262, 533-548.

[6] There was no organizing or other notable activity at the time, and there is no claim either of the rules were promulgated in response to union activity. JA 6-16.

lanyard] that might fall into a place when you're setting up a sterile field would become a public safety issue." JA 137.

The Hospital commissioned a uniform design company to create a standardized, professional, customized and consistent looking uniform. JA 246-248, 251, 258, 259, 473-480, 533-552. The uniforms were designed to be color-coordinated by professional discipline, such as navy blue for RNs, wine for emergency department technicians, etc. JA 473-476. Embroidered on the upper-left shoulder of each uniform is the Memorial logo *and* the discipline of the direct care provider, *i.e.* "RN." JA 110-111, 173-174, 186-187, 246-248, 251, 258, 259, 473-481, 549-555, 568, 574. The Hospital asked the design company to design a means to securely attach the Memorial-reel to the upper right shoulder of the uniform. *Id.* The result was a uniquely designed fabric "loop" to which the Memorial-reel and I.D. badge must be affixed. JA 112, 165. The uniform was intentionally designed so that the Hospital's Memorial logo would be featured on both shoulders of the uniform in a balanced and streamlined manner. JA 110-111, 173-174, 186-187, 246-248, 251, 258-260, 480, 549-555. The Memorial-reel is a required part of the actual uniform itself. *Id.*

The Hospital drafted two policies, meant as a set, in which it described all the various requirements of the (then new) standardized uniform for its direct patient care employees: (1) "Uniform and Infection Prevention Standards for

Direct Care Providers Policy PC-261.01" and (2) "Appearance and Grooming Standards for Direct Care Providers Policy PC-261.02" ("uniform policies").[7] JA 473-479. The two policies were intended to act as a companion pair; they repeat the same stated rationale, contain duplicative language and explicitly cross-reference each other. JA 473-479, 568. The policies explicitly state that the Hospital is dedicated to "the safest care of patients including the prevention and transmission of pathogens" and that the uniform policies apply to "the attire of healthcare providers" in order to prevent "hospital acquired infections" and "contamination by attire. *Id*. They also state: "Patients may lack confidence and trust in individuals that are not easily identified as health care professionals. Promoting standard attire will assist patients in easily identifying their care providers and in promoting satisfaction." *Id*. The policies state that they are meant to "prevent hospital acquired infections *in all patient care areas*." *Id*. (emphasis added). Policy 261.02 describes its "Scope" as applying "to all those who work in any capacity in providing direct patient care;" it also explicitly cross-references its companion policy, stating "Clothing/uniform guidelines are outlined in the Uniform Policy for Direct Care Providers." JA 477-479. The policies describe at

[7] The challenged Memorial-reel Rule is limited to one sentence, "Badge reels may only be branded with MemorialCare approved logos or text." contained in 6 total pages of the uniform policies. JA 473-479

great length that their scope is limited only to direct care providers in uniform and on duty in patient care areas. JA 251-258, 277-286, 473-479. The General Counsel and Union admitted as much at the Hearing. JA 277-286. As the ALJ noted, "the badge reel rule is expressly limited to direct patient-care providers." JA 572.

On December 1, 2014, Hospital managers began distributing the uniform Memorial-reels to all patient care providers, explicitly explaining that it was a part of the uniform. JA 259-265, 307-311, 549. Direct care providers understood that the new standardized uniform required that *only* the Memorial-reel be worn, and no other. JA 135, 161, 333-337, 549-555. The new uniforms were delivered to the employees at home in a box that included the Memorial-reel. JA 135, 139, 161, 319-320, 480, 549, 568. The Hospital invested a significant amount of time and money in designing and perfecting the quality and functionality of the Memorial-reel. JA 259-265, 328-329, 480, 549-555.

The Memorial-reel is not an optional item; it is a required part of the Hospital's standardized uniform itself. JA 135, 139, 161, 320-337, 549-555. Only one badge reel—and *no other*—can be worn as part of the Hospital's direct patient care provider uniform, precisely because the Memorial-reel *is part of the uniform itself*. *Id*. The overwhelming evidence proved this; one of the General Counsel's witnesses testified three times in a row that she understood she was *required* to wear "The Memorial reel." JA 186-187.

This issue is ultimately about an employer's First Amendment right to have a uniform—and not about any so-called "overbroad" policy language. Even if the overruled *Lutheran Heritage* test were still valid, which it is not, it would still be impossible to find the Board had made a correct decision here. The uniform policies clearly state that they are applicable only to direct patient care providers while on duty in patient care areas, and there was no testimony or dispute to the contrary. JA 277-286, 473-479. There was certainly no evidence presented that the scope of the rule had ever been unlawfully applied. JA 572. There should be no question that the uniform reel rule requirement is lawful. To the extent there is any question otherwise, the facts must be viewed under *Boeing*.

D. There Is No Prohibition Against Wearing Union Insignia.

Hospital employees are, and have been, free to wear union insignia. JA 119-120, 164, 199, 238-239, 277-278, 283-289, 349, 470-479. The RN Union stewards who testified, as well as the Hospital's witnesses, all admitted that employees can, and do, wear Union insignia on a regular basis. JA 119-120, 164, 199. The Hospital has about 50 Union stewards. JA 342. Direct care providers may wear shirts, jackets, lanyards, badge reels, etc., bearing union or other insignia as long as they are not on duty and in uniform in a patient care area and in accordance with policy. JA 119-120, 164, 199, 238-239, 277-278, 287-289, 283, 285, 349. All witnesses testified that employees, including direct care providers, who are in the

cafeteria, parking lots, the lobby, in meetings, break rooms, attending training sessions, etc., may and do wear union insignia. JA 119-120, 164, 199, 238-239, 277-278, 283, 285, 470-479. About 2,200 employees who do not have patient care positions may still wear lanyards, badge reels and other attire with any logo they wish, so long compliant with Hospital policy. JA 164, 277-278, 470-479. In fact, even while in uniform in a patient care area employees could still wear and display union insignia; earrings, necklaces, tattoos, nail polish, etc. JA 245, 288-289.

II. Procedural History.

A. The Complaint and Administrative Hearing.

In the July 28, 2015 charge, the Union alleging that the Hospital had "implemented an overly broad dress code policy" in violation of Sections 8(a)(1) and 8(a)(5) of the Act. JA 6. On September 16, 2015, the Union filed its "First Amended" charge alleging that Hospital had unlawfully "promulgated and maintained an overly broad dress code policy," and "disparately enforced the policy with regard to union insignia." JA 7. On October 19, 2015, the Union filed a "Second Amended" charge, adding an allegation that the Hospital had, on October 7, 2015, "harassed a Nurse Representative while disparately enforcing the unlawful dress code policy." JA 8. Neither the Union nor the General Counsel ever alleged a violation of Section 8(a)(3). JA 9-16, 272.

The Complaint was issued on December 29, 2015. JA 9-16. It alleged that the Hospital had violated 8(a)(1) by *maintaining* one Policy #318 (March 3, 2014) and by prohibiting two RNs from wearing a *Union* logo badge reel. *Id*. The Hospital filed an Answer on January 11, 2016, denying the allegations. JA 17.

The ALJ Hearing was held on May 23, 2016 and May 24, 2016. The General Counsel amended the Complaint to add PC 2601.02, and alleged the Hospital's maintenance of the Memorial-reel Rule was unlawful. During the Hearing, both the General Counsel and the Union argued that the Hospital's mere maintenance of the two attire rules violated Section 8(a)(1) of the Act. JA 251-259, 262-268, 277-290. Although the overwhelming evidence showed that employees understood the very precise nature of the two attire rules, their entire cases rested solely on the *wording* and *reading* of the challenged rules. *Id*. At the time of the case, including up until the parties finished briefing their issues on appeal to the Board, the applicable law when faced with an allegation that an employer's work rule violates Section 8(a)(1) was *Lutheran Heritage*, 343 NLRB 646 (2004).

B. The ALJ's Decision.

On August 31, 2016, after considering the record evidence and the parties' briefs, the ALJ held that the Memorial-reel Rule was not unlawfully overbroad nor disparately enforced. JA 566-580. The ALJ found that the Memorial-reel was part of the uniform to be worn by patient care providers while working in uniform in

patient care areas. *Id*. The ALJ found for the Hospital on all issues, except one: The ALJ found the I.D. Rule in Policy #318 was overly broad under "prong one" of the *Lutheran Heritage* test. *Id*.

The General Counsel and Union both appealed the ALJ's holding in favor of the Hospital regarding the Memorial-reel Rule. The Union alone appealed the ALJ's finding there was no disparate enforcement. The Hospital cross-appealed the ALJ's finding that the I.D. Rule was overly broad. The parties filed a total of eight briefs between October 12, 2016 and December 26, 2016. JA 590-785.

C. The Board Issued its Decision in *Boeing*.

On December 14, 2017, the Board expressly overruled *Lutheran Heritage*, and it announced a new balancing test to be applied when determining the lawfulness of workplace rules in *Boeing*. 365 NLRB No. 154, at 3.

D. The Board's Unsupported Decision and Order.

The Board issued its decision on April 20, 2018, several months after the Board, in *Boeing*, expressly overruled *Lutheran Heritage*. JA 786-798. The parties had argued and analyzed the facts under the now defunct *Lutheran Heritage* test, and yet the Board's decision does not mention *Boeing* or *Lutheran Heritage*. *Boeing* is the controlling precedent and the Board is bound by it. 365 NLRB No. 154, at 14-17. The Board therefore failed to apply the controlling legal standard in this case. The Board offered no explanation for its extraordinary departure. The

Board's silence speaks volumes—an invisible acknowledgment of brazen error. The Board's unsupported decision cannot stand.

SUMMARY OF ARGUMENT

This case is about the Hospital's lawful maintenance of two legitimate attire rules. The controlling case for determining the lawfulness of workplace rules is *Boeing*. Not only has the Board ignored controlling precedent, the substantial evidence in the record, and applied the wrong law, but it has done so *knowingly*. The Board Majority in this case (Pearce and McFarren) wrote the dissenting opinions in *Boeing* just four months earlier. 365 NLRB No. 154, at 23-44. The Board Majority did not make any mistakes, rather it intentionally attempted to ignore the facts and applicable law.

To be clear, this case is not about a ban on union insignia, nor is it about a selective ban on union insignia. This case is not about union insignia at all. This case is about a Hospital's right to make decisions based on legitimate business needs and circumstances regarding what its employees are required to wear.

Let there be no mistake: The Board is attempting to force the Hospital to *replace* a uniform item bearing its own Memorial logo with some other item bearing the Union's logo, instead. The Board is a government agency—*not* a uniform design company. The Memorial-reel is not an optional item; it is a required part of the Hospital's standardized uniform itself.

This case is also about an employer's right to place reasonable restrictions on certain apparel when an employer has legitimate reasons and/or special circumstances to do so. Here, the Hospital has a rule restricting the information that is displayed or placed on its critical employee I.D. badges. The restrictions are reasonable, necessary and entirely lawful.

Finally, this case must be analyzed under the appropriate law, which is *Boeing*. 365 NLRB No. 154. Yet the Board not only fails to mention or correctly apply *Boeing*, but it also conveniently fails to mention *Lutheran Heritage*, instead citing to its predecessor case *Lafayette Park Hotel*, 326 NLRB 824 (1998), *enfd*. 203 F.3d 52 (D.C. Cir. 1999). This is a veiled and simplistic attempt to avoid any reference to the *Boeing's* express rejection of the *Lutheran Heritage* standard.[8]

Such "'[s]ilence in the face of inconvenient precedent is not acceptable." *Jicarilla Apache Nation v. Dep't of Interior*, 613 F.3d 1112, 1120 (D.C. Cir. 2010). "An agency's failure to come to grips with conflicting precedent constitutes 'an inexcusable departure from the essential requirement of reasoned decision making.'" *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (quoting

[8] As discussed in Section IV of the Argument, not only did the Board fail to mention either *Boeing* or *Lutheran Heritage*, but it further sought to try to hide unfavorable facts from this Court by arguing that the three omitted briefs filed by the parties on appeal to the Board are *not* part of the record, when they clearly are. The Board's convenient cherry-picking of what to include as "part of the record" must not be allowed. There is no excuse for this kind of game-playing.

Columbia Broad. Sys. v. FCC, 454 F.2d 1018, 1027 (D.C. Cir. 1971)). It is "elementary that an agency must conform to its prior decisions or explain the reason for its departure from such precedent." *Gilbert v. NLRB*, 56 F.3d 1438, 1445 (D.C. Cir. 1995). "[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not causally ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

The Supreme Court held that the "grounds upon which an administrative order must be judged are those upon which the record discloses that the action was based." *SEC v. Chenery Corp*., 318 U.S. 80, 87 (1943). This Court has stated: "When the Board concludes that a violation of the NLRA has occurred, we must uphold that finding unless it 'has no rational basis' or is 'unsupported by substantial evidence.'" *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) *quoting United Mine Workers of Am., Dist. 31 v. NLRB*, 879 F.2d 939, 943 (D.C. Cir. 1989).

Here the Board has no rational basis for ignoring *Boeing* and there is substantial evidence establishing the lawfulness of the rules. For each of these reasons, the Board's decision must be vacated.

STANDING

Long Beach has standing because it was adversely affected and substantially aggrieved by the Board's decision and order under review. *See Liquor Salesmen's Union v. NLRB*, 664 F.2d 1200, 1206 n8 (D.C. Cir. 1981) (standing exists where there is an "adverse effect in fact" on petitioner); *see also Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002).

STANDARD OF REVIEW

Pursuant to the Administrative Procedure Act, an order of the Board must be set aside if the Board's reasoning is "inadequate, irrational or arbitrary." *Allentown Mack Sales & Services, Inc. v. NLRB*, 522 U.S. 359, 364 (1998) (internal quotes omitted). Thus, if the Board "fail[s] to apply the proper legal standard," or "depart[s] from established precedent without reasoned justification," its order "will not survive review." *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 446 (D.C. Cir. 2004); *see* 5 U.S.C. § 706(2)(A).

A reviewing court may set aside a Board decision "when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951). The Board "is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly

demands." 522 U.S. at 378. In reviewing the Board's decision, the Court must consider the "whole record," including not only materials that support the Board's findings but also "whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. at 488. Finally, while the NLRB has broad discretion in devising remedies, such "deference . . . does not constitute a blank check for arbitrary action." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316 (1979).

ARGUMENT

I. Under *Boeing*, the Uniform Memorial-reel Rule is Lawful.

There can be no question an employer has a right to establish a uniform for its employees and is privileged to design its own uniforms so the employer's own logo is featured, as and where it chooses. There is certainly no law that authorizes the Board, a union, or an employee to *change* an employer's existing uniform. Again, the Board is a government agency—*not* a uniform design company. The Board does not have the authority to force the Hospital to *replace* its own Memorial logo bearing uniform item—with some other item that bears the Union's logo, instead. Nothing in the NLRA sanctions such over-arching authority, and even if there were, such government action would violate the First Amendment of the Constitution. U.S. CONST., amend I. This must not be allowed to happen.

Moreover, there is no excuse for the Board's failure to apply the controlling standard and case, *Boeing*, which it was bound to follow. Instead without any reason or explanation for its extreme departure from rational decision-making, the Board applied the wrong law and no facts, and made the wholly unfounded ruling that the Hospital's Memorial-reel Rule is "overbroad." The Board's behavior, here, is embarrassingly arbitrary and unreasonable.

The Hospital's uniform policy requires that *only* the Memorial-reel be worn as part of the standardized uniform for direct care providers when performing patient care duties in patient care areas. Thus, by its very nature, the rule cannot even conceivably be deemed "overbroad," as the complete opposite is true. The rule, in context and as universally understood by employees, could not be more precise, specific, limiting and exact. In any event, the Board is not entitled to do what it did here, which is to read policy language in a vacuum without any regard to the context, facts or circumstances and concoct some theoretical concept based on how the Board *thinks* an employee might interpret or "could reasonably construe" the rule. This is especially so when confronted with uncontroverted evidence that employees *did not* share its tortured theoretical reading.

The *Boeing* Board made it extremely clear, stating, "[W]e have decided to overrule the *Lutheran Heritage* 'reasonably construe' standard." 365 NLRB No. 154, at 3. In *Boeing*, a fully constituted Board set forth a new balancing test, one

that the Board *must* use when analyzing the lawfulness of workplace rules. The Board expressly overruled the incredibly ambiguous test set forth in *Lutheran Heritage* precisely because it was so arbitrary and unreasonable. 365 NLRB No. 154, at 3, 9-11. *Boeing's* outright rejection of the "reasonably construe" standard completely eliminated the General Counsel's and the Union's "rationale" for arguing that the Hospital's Memorial-reel Rule is unlawful, yet inexplicably, the Board Majority here silently applied.[9]

As the Board in *Boeing* noted, the D.C. Circuit has criticized the Board's failure to give adequate weight to justifications associated with reasonable work rules. *Boeing,* 365 NLRB No. 145, at 14; citing *Medco Health Solutions of Las Vegas, Inc. v. NLRB*, 701 F.3d 710, 717-718 (D.C. Cir. 2012). Yet here, the Board Majority seemingly slipped back into old habits with its finding that the Hospital's attire rules violated Section 8(a)(1)—a finding that should be overturned.

In *Boeing* the Board noted that "linguistic precision" was not required, and that it was rejecting the single-minded consideration that resulted from the ambiguous application of *Lutheran Heritage*. *Boeing*, 365 NLRB No. 154, at 2. Further, the Board held that ambiguities in work place rules will no longer be

[9] The NLRB's Office of the General Counsel issued Memorandum GC 18-04 on June 6, 2018 ("*GC 18-04*"). In it, the General Counsel discusses *Boeing's* applicability, and explicitly mentions this case and the fact that the *Boeing* standard applies to the maintenance of attire rules. *GC 18-04*, at 2 n.4.

construed against the drafter. *Id*. at 9, n. 43; *GC 18-04,* at 1. Yet it is abundantly clear that is precisely what the Two-Member Majority did here.

Under *Boeing*, when evaluating the lawfulness of work rules:

> …the Board will evaluate two things: (1) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule. We emphasize that *the Board* will conduct this evaluation, consistent with the Board's "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy," focusing on the perspective of employees, which is consistent with Section 8(a)(1).

365 NLRB No. 154, at 3 (internal citations omitted).

The Board, in *Boeing*, set forth "categories," in which to analyze different types of rules depending on the scenario and circumstances at issue. 365 NLRB No. 154, at 4. The Board stated: "*Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule." *Id*. The Board continued: "*Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications." *Id*.

The challenged work rules, here, clearly fall in Category 1. In *Boeing*, the Board held Category 1 rules lawful because even though they have "a reasonable tendency to interfere with Section 7 rights, the Board has determined that the risk of such interference is outweighed by the justifications associated with the rules." *Id*. The Board held that the *Lutheran Heritage* "reasonably construe" standard "is contrary to Supreme Court precedent because it does not permit *any* consideration of the legitimate justifications that underlie many policies, rules and handbook provisions." *Id*. at 7. The *Boeing* Board talks at great length about the balance the Board must strike between the employer's interest, and the employees' rights, at issue. *Id*. Further, under *Boeing*, context is crucial, and the "unique characteristics of particular work settings and different industries" is relevant. *Id*. at 10.

Here, the Board failed to address the overwhelming, obvious and undisputed facts establishing the Hospital's legitimate justifications for requiring that *only* the Memorial-reel may be worn. JA 277-286, 473-479. The Hospital designed the uniform intentionally for the most professional, streamlined look, including that care providers wear the Memorial-reel on their uniforms in the designated area to balance the Memorial logo and the employee's area of professional discipline (e.g., RN) on each side of the uniform. The obvious branding reasons alone would be sufficient for any employer. Here the evidence established, in addition to branding, the Hospital's clean, readily identifiable, standardized look actually had

a patient care purpose. Moreover, the evidence made clear that the employees understood the context and purpose of the rule was to require the Memorial-reel as part of the uniform while working in patient care areas.

The Board Majority chose to ignore the abundance of factual evidence and instead focus on words in isolation, eschewing the *Boeing* standard and improperly reverting to the *Lutheran Heritage* analysis without explanation or citation. Had the Board properly applied the *Boeing* balancing test, it would have had to uphold the ALJ's finding that the Memorial-reel Rule is lawful. Respectfully, the Board's decision with respect to the uniform Memorial-reel should be set aside and reversed.

II. Under *Boeing*, the I.D. Rule is Lawful.

The Board entirely failed to address the facts and issue relating to the I.D. Rule in Policy #318. In fact, the Board wantonly tossed the entire issue aside in footnote 2 of its decision, stating: "In affirming the judge's findings with regard to Policy #318, we do not pass on whether the prohibition at issue would be lawful *if it were limited to attaching non-approved pins and badges to the employee identification badges*." JA 786 (emphasis added).

Employers are entitled to place restrictions on apparel when their legitimate business justifications (or special circumstances) outweigh any impact such restrictions may have on employees' Section 7 rights. *Boeing*, 365 NLRB No. 154.

Here, the Hospital has a narrow rule restricting only the information placed on employees' I.D. badges. The restrictions are reasonable, necessary and entirely lawful, particularly under these facts and circumstances.

The employee I.D. badge displays a great deal of critical information, while also acting as a powerful access tool to authorized-only, restricted areas within the Hospital, if their job position and I.D. badge allows such access. The Hospital has legitimate, real-life concerns and reasons for needing to control the information displayed on its 6,000 employees' I.D. badges, such as access to drugs/medication, life or death situations, suicide watch patients, visitors carrying weapons, etc. and faces devastating consequences should employees fail to comply. The Hospital has legitimate interests in ensuring that its employees display proper, accurate, relevant uniform identifying information on their I.D. badges. The Hospital must be able to control and limit the information displayed on employee I.D. badges.

Boeing requires a balancing of interests, and here, the balance clearly weighs heavily in favor of the Hospital. 365 NLRB No. 154, at 7. The facts and circumstances fully justify the Hospital's legitimate business reasons for maintaining the I.D. Rule, which rightfully limits the information that can be placed on a Hospital employee's I.D. badge.

Moreover, the uncontroverted evidence established that employees understood the history and context of the I.D. Rule, and that the challenged rule

only referred to putting pins *on the I.D. badge*. The Board has held that when employees understand their employer's legitimate need to protect against liability, such as here, there is no violation of the Act. *Boeing*, 365 NLRB No. 154, at 8; *quoting Flagstaff Medical Center,* 357 NLRB 659, 663 (2011) (holding that employees would reasonably interpret the hospital's rule of prohibiting photographing of "patients and/or hospital equipment, property, or facilities" as a "legitimate means of protecting the privacy of patients and their hospital surroundings, not as a prohibition of protected activity.").

In the decision on review, the Board clearly did not apply the correct facts, much less law, regarding I.D. Rule. The I.D. Rule in Policy #318 is limited strictly to pins worn on employee I.D. badges; it does not apply to pins worn anywhere else. In fact, in context, including the evidence employees knew the rule applied only to pins on I.D. badges and the evidence that employees routinely wore union insignia, the Board ruling is nonsensical. What employer would limit Union pins, the smallest of all items, but allow larger items, such as Union shirts? No employee has been restrained here.

The Board utterly failed to address *any* evidence, much less substantial evidence in the record, and it did not apply *any* law. Even the Board's own General Counsel both noted that *Boeing* applies to apparel rules that are allegedly unlawfully "overbroad" and explicitly called-out the three-Member Board for

finding the Hospital's "restrictions on wearing union pins overbroad and unlawful without reference to *Boeing*." *GC 18-04*, at 2. Given the context, understanding of employees and legitimate business reasons for the rule, it is lawful under *Boeing*.

When balancing employee rights against the Hospital's interests, the answer is crystal clear. No employee has been restrained here. This case is one that highlights the dangers of allowing the Board to overly dissect and prescribe unintended meaning to employers' policies that have real-life, important purposes that are widely understood in the workplace, but not to an outsider.

Finally, the Board's upholding of the ALJ's finding under the now-overruled *Lutheran Heritage* is, by itself, reversible error. As noted, the Board provides no analysis to support its adoption of the ALJ's ruling on the employee I.D. Rule. In failing to do so, the Board *de facto* committed prejudicial error, deviated from established precedent and failed to apply the correct controlling law.

The ALJ decision, issued in August 2016, was undeniably was based on application of *Lutheran Heritage* to the I.D. Rule, as it was the controlling precedent at the time. However, by April 2018, when the Board issued its decision here, *Lutheran Heritage* had been overruled with an explicit directive that the new *Boeing* balancing test be retroactively applied to all pending cases, which includes this one. *Boeing*, 357 NLRB No. 154, at 14-17. Yet inexplicably and without explanation, the Board ignored its own directive and failed to evaluate the

challenged rules under the new *Boeing* standard. Rather, the Board rubber-stamped, without analysis, the ALJ's *Lutheran Heritage*-based ruling regarding the I.D. Rule. Moreover, because the ALJ's, and consequently the Board's, rulings on the I.D. Rule rely upon, and are dependent on, overruled authority, they are by definition irreparably flawed and must be vacated.

III. This Case is Distinguishable from Those Cited by the Board.

The Board decision cites to cases that address "ribbons," "buttons," or "badges"[10] that employees wore in response to organizing drives. However, these cases are inapposite, as this case is entirely distinguishable from the healthcare facility line-of-cases that address provocative or contentious content-based messaging during a union campaign effort. Unlike those cases, this case does *not* involve a *selective* ban on specific, content-based union messaging displayed on a button, ribbon or similar item nor does it involve a rule promulgates in response to union organizing. To the contrary, the undisputed evidence here established the Hospital permitted union apparel and insignia of varying types, but merely prohibited any replacement of the required uniform Memorial-reel, and the placement of any non-Hospital-related distractions or obstructions on the I.D.

[10] The record was clear that in over 16 years, there has only been one type of badge worn at the Hospital: the employee I.D. badge. JA 183. Thus, this is not a case about any type of badge—other than the employee I.D. badge.

badge. Thus, the facts and legal analysis underlying the cases where healthcare facilities are required to justify why a selective ban on inflammatory, content-based messaging are *not* analogous and *not* applicable here.[11]

Additionally, because analysis of workplace rules now require a balancing of interests, the more burdensome "special circumstances" test is arguably no longer valid. *Boeing*, 357 NLRB No. 154, at 10-11, 14-15. Moreover, the special circumstances test, even if valid, is not applicable to this case, as there was no ban on *union insignia*. The special circumstances test is only applied when there is some regulation which result in a *ban* on union messaging or apparel. That is *not* the case, here. Nevertheless, the Hospital demonstrated more than sufficient business justifications and special circumstances for both its challenged policies.

"Special circumstances justify restrictions on union insignia or apparel 'when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees.'" *Starwood Hotels and Resorts Worldwide, Inc.*

[11] *See e.g. Healthbridge Management, LLC*, 360 NLRB No. 118 (2014) (finding a ban on wearing a "Busted" sticker unlawful); *Saint John's Health Center*, 357 NLRB 2078 (2011) (finding a prohibition against wearing a ribbon stating "Saint John's RNs for Safe Patient-Care" unlawful); *Sacred Heart Hospital*, 347 NLRB 531 (2006) (holding that a prohibition against wearing a button stating "RNs Demand Safe Staffing" *lawful*).

d/b/a W San Diego ("W Hotel"), 348 NLRB 372, 373 (2006) *citing Komatsu,* 342 NLRB 649, 650 (2004); *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979).

The Board previously held it will find "special circumstances" justifying *a ban on union insignia* where the employer has demonstrated that the display of insignia may "unreasonably interfere with the public image that the employer has established, as part of its business plan, through appearance rules for its employees." *W Hotel*, 348 NLRB at 373 fn.9 *citing Nordstrom, Inc*., 264 NLRB 698, 700 (1982). The Board favors limitations on employees' wearing of union insignia in the workplace that are *narrowly tailored* to the special circumstances justifying maintenance of the rule. *W Hotel*, 348 NLRB at 373 (the special circumstances that justified the employer's ban on union buttons in public areas did not justify the ban on union buttons in nonpublic areas).

Here, such narrowly tailored limitations exist and have been proven with regards to both rules being challenged. It is unnecessary to make the Memorial-reel Rule any narrower than it already is. With respect to the I.D. Rule, any references to "badges" in Hospital policies and the prohibition on pins refer only to the I.D. badge. JA 210.

Both rules must be evaluated under *Boeing*, but even under a special circumstances analysis the rules are still lawful. The substantial, overwhelming record evidence demonstrates this.

IV. The Omitted Briefs Are Part of the Record.

The Board's Certified List omitted three necessary briefs from the record. The Court should include each of them to ensure a clear record.

This Court has relied upon parties' "briefs in support" of exceptions and cross-exceptions to determine whether they sufficiently preserved a particular objection, including, issues and legal arguments. *See e.g. HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1069 (D.C. Cir. 2015); *Diamond Walnut Growers v. NLRB*, 113 F.3d at 1264 (D.C. Cir. 1997). An objection was "urged before the Board" if it was raised *in briefing* prior to the Board's decision. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (finding an issue barred because it was "not raised during the proceedings before the Board"); *NLRB v. U.S. Postal Serv.*, 833 F.2d 1195, 1202-1203 (6th Cir. 1987) (recognizing that *briefing on exceptions* before the Board is sufficient to preserve a parties' objection). "Because this bar is jurisdictional, we are required, *sua sponte*, to appraise the record to determine whether an objection has been effectively preserved for appeal." *Sheet Metal Workers, Local No. 91 v. NLRB*, 905 F.2d 417, 422 n.10 (D.C. Cir. 1990) (internal quotations omitted).

As noted in Long Beach's motion to this Court, the three briefs *omitted* from the Board's Certified List should be included as part of the record on appeal. The Board's own rules and instructions require this. *See* JA 581-586; 29 C.F.R. §§

102.45-102.46. A quick look at the first few pages of the briefs call attention to their relevance, as they all reference *Lutheran Heritage*, which has been overruled. The arguments were urged before the Board, and the Hospital respectfully asks this Court to make the three omitted briefs part of the record before this Court.

CONCLUSION

For the foregoing reasons, Long Beach respectfully requests that this Court (i) grant its petition to review, (ii) deny the Board's cross-application for enforcement, (iii), vacate the Board's decision and (iv) remand the matter to the Board with instructions to dismiss the complaint.

DATED: November 5, 2018

Respectfully submitted,

By: /s/ Adam C. Abrahms

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ADDENDUM OF STATUTES AND REGULATIONS

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Administrative Procedure Act

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

National Labor Relations Act, as amended

29 U.S.C. § 157

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their

own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

29 U.S.C. § 158(a)

Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]…

29 U.S.C. § 160(e)

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its

member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

29 U.S.C. § 160(f)

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

NLRB Rules and Regulations

29 C.F.R. § 102.45 – Administrative law judge's decision; contents; service; transfer of case to the Board; contents of record in case.

(a) After hearing for the purpose of taking evidence upon a complaint, the administrative law judge shall prepare a decision. Such decision shall contain findings of facts, conclusions, and the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record, and shall contain recommendations as to what disposition of the case should be made, which may include, if it be found that the respondent has engaged in or is engaging in the alleged unfair labor practices, a recommendation for such affirmative action by the respondent as will effectuate the policies of the Act. The administrative law judge shall file the original of his decision with the Board and cause a copy thereof to be served on each of the parties. If the administrative law judge delivers a bench decision, promptly upon receiving the transcript the judge shall certify the accuracy of the pages of the transcript containing the decision; file with the Board a certified copy of those pages, together with any supplementary matter the judge may deem necessary to complete the decision; and cause a copy thereof to be served on each of the parties. Upon the filing of the decision, the Board shall enter an order transferring the case to the Board and shall serve copies of the order, setting forth the date of such transfer, on all the parties. Service of the administrative law judge's decision and of the order transferring the case to the Board shall be complete upon mailing.

(b) The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, notice of hearing, answer and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in §102.46, shall constitute the record in the case.

29 C.F.R. § 102.46 – Exceptions, cross-exceptions, briefs, answering briefs; time for filing; where to file; service on the parties; extension of time; effect of failure to include matter in exceptions; reply briefs; oral arguments.

(a) Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to §102.45, any party may (in accordance with section 10(c) of the Act and

§§102.111 and 102.112 of these rules) file with the Board in Washington, DC, exceptions to the administrative law judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of said exceptions. Any party may, within the same period, file a brief in support of the administrative law judge's decision. The filing of such exceptions and briefs is subject to the provisions of paragraph (j) of this section. Requests for extension of time to file exceptions or briefs shall be in writing and copies thereof shall be served promptly on the other parties.

(b)(1) Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. If no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document shall be subject to the 50-page limit as for briefs set forth in §102.46(j).

(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(c) Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

(1) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(2) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(3) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

(d)(1) Within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, a party opposing the exceptions may file an answering brief to the exceptions, in accordance with the provisions of paragraph (j) of this section.

(2) The answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof. It shall present clearly the points of fact and law relied on in support of the position taken on each question. Where exception has been taken to a factual finding of the administrative law judge and it is proposed to support that finding, the answering brief should specify those pages of the record which, in the view of the party filing the brief, support the administrative law judge's finding.

(3) Requests for extension of time to file an answering brief to the exceptions shall be in writing and copies thereof shall be served promptly on the other parties.

(e) Any party who has not previously filed exceptions may, within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, file cross-exceptions to any portion of the administrative law judge's decision, together with a supporting brief, in accordance with the provisions of paragraphs (b) and (j) of this section.

(f)(1) Within 14 days, or such further period as the Board may allow, from the last date on which cross-exceptions and any supporting brief may be filed, any other party may file an answering brief to such cross-exceptions in accordance with the provisions of paragraphs (c) and (j) of this section. Such answering brief shall be limited to the questions raised in the cross-exceptions.

(2) Requests for extension of time to file cross-exceptions, or answering brief to cross-exceptions, shall be in writing and copies thereof shall be served promptly on the other parties.

(g) No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding.

(h) Within 14 days from the last date on which an answering brief may be filed pursuant to paragraph (d) or (f) of this section, any party may file a reply brief to any such answering brief. Any reply brief filed pursuant to this subsection shall be limited to matters raised in the brief to which it is replying, and shall not exceed 10 pages. No extensions of time shall be granted for the filing of reply briefs, nor shall permission be granted to exceed the 10 page length limitation. Eight copies of any reply brief shall be filed with the Board, copies shall be served on the other parties, and a statement of such service shall be furnished. No further briefs shall be filed except by special leave of the Board. Requests for such leave shall be in writing and copies thereof shall be served promptly on the other parties.

(i) Should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board simultaneously with the statement of any exceptions or cross-exceptions filed pursuant to the provisions of this section with a statement of service on the other parties. The Board shall notify the parties of the time and place of oral argument, if such permission is granted. Oral arguments are limited to 30 minutes for each party entitled to participate. No request for additional time will be granted unless timely application is made in advance of oral argument.

(j) Exceptions to administrative law judges' decisions, or to the record, and briefs shall be printed or otherwise legibly duplicated. Carbon copies of typewritten matter will not be accepted. Eight copies of such documents shall be filed with the Board in Washington, DC, and copies shall also be served promptly on the other parties. All documents filed pursuant to this section shall be double spaced on 8 1/2- by 11-inch paper. Any brief filed pursuant to this section shall not be combined with any other brief, and except for reply briefs whose length is governed by paragraph (h) of this section, shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed not less than 10 days prior to the date the brief is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LONG BEACH MEMORIAL MEDICAL CENTER D/B/A MEMORIALCARE LONG BEACH MEDICAL CENTER & MEMORIALCARE MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH, *Petitioner/Cross-Respondent*, v. NATIONAL LABOR RELATIONS BOARD, *Respondent/Cross-Petitioner*, and CALIFORNIA NURSES ASSOCIATION/ NATIONAL NURSES UNITED *Intervenor for Respondent.*	Case No. 18-1125 (consolidated with 18-1143)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), Long Beach certifies that the foregoing brief contains 8,412 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

DATED: November 5, 2018 By: /s/ Adam C. Abrahms

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2018, the foregoing document is being filed electronically with the Clerk of the Court by using the CM/ECF system, thereby serving it on all parties of record.

DATED: November 5, 2018 By: /s/ Adam C. Abrahms

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